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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH JAMES RUBALCABA, Defendant and Appellant.	H026461 (Santa Clara County Super.Ct.No. CC272078)

Defendant Joseph James Rubalcaba appeals from his conviction of second degree robbery with use of a firearm in violation of Penal Code sections 211-212.5 and 12022.53, subdivision (b). He challenges the admission in evidence of his tape-recorded, police interview at his jury trial. Defendant asserts that he was deprived of due process because his incriminating statements were involuntary in that, after he was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and he waived them, the interviewing police officer made impermissible, express promises of leniency that were the primary, motivating cause of the statements.

Based on the totality of the circumstances in this case, we disagree with defendant's assertion and conclude that his incriminating statements were not involuntary because the interrogating officer's representations about which defendant complains either did not amount to impermissible promises of leniency, or the inducements were not

the motivating cause of defendant's incriminating statements. We accordingly affirm the judgment.

Factual Background

1. The Crime

Defendant was 20 years old on November 5, 2002, when he entered the 7-Eleven store on South White Road in San Jose at about 4:30 a.m. His entry into the store was immediately preceded by that of Michael Q., a juvenile relative of defendant. Baldir Singh Hothi was alone working the nightshift at the store. He was crouched down behind the counter and looking down counting lottery scratchers when Michael, who was small in stature and wearing a dark mask, entered the store and headed toward the rear where the cooler was located. Because he was occupied, Hothi said, "Hi," but did not then look up to see Michael's masked face.

Then, defendant—larger in stature and wearing a hooded mask that concealed his face but for his eyes—entered the store carrying a shotgun with a handle grip.[1] Defendant approached Hothi at the counter. Pointing the gun directly at him, defendant demanded money. Michael then approached the counter from the rear of the store. He stood to the side of Hothi and pointed what looked like a handgun (but was really a painted toy gun) at him. Hothi was afraid. He reached several times into the drawer that held the money, took some bills—totaling between $150 and $200—and placed them on the counter. Defendant, with his sleeve pulled down over his hand, grabbed the cash each time. Then, Hothi pulled out the entire drawer and placed it on the counter.

After taking the money, the two perpetrators left the store. Just following their departure, Hothi pushed the police alarm. Marcus Rubalcaba, defendant's cousin and the getaway driver, was waiting for defendant and Michael in a car near the store. Marcus

[1] The manner in which he carried the gun suggested he was left-handed, as other evidence revealed defendant to be.

later told police that when defendant and Michael were leaving the store, they discussed just having "jacked" somebody.

A police officer arrived at the 7-Eleven about 10 minutes after the alarm. Upon arrival, the officer viewed the store's surveillance videotape of the robbery. The faces of the two intruders were not identifiable from it because they were mostly concealed by the masks. And, though the tape showed the first robber enter the store and head toward the rear cooler area, he was standing out of the camera's range during the actual hold-up. The tape thus did not show him pointing the smaller gun at the store clerk. But, the video did show the second and larger robber pointing the shotgun directly at Hothi. Though it also showed this robber touching the store counter with his covered hand when he grabbed the money, no fingerprints were able to be recovered.

2. Police Investigation and Defendant's Arrest

After some initial police investigation that suggested Michael had been involved in the crime, a detective received a telephone call on December 3, 2002, from Michael's father, who was in Missouri with his son. The father informed the detective that his son had been involved in a robbery in San Jose during which he had used a fake gun and that the other gunman in the crime was a nephew of "Anthony." Anthony is defendant's uncle. Michael himself spoke by phone to the detective and told him that he had been involved in the 7-Eleven robbery on November 5, 2002, and that he had used a toy gun. Upon Michael's return to California from Missouri later in December, he was arrested.

On December 4, 2002, another detective interviewed Marcus while he was in custody in connection with several robberies. Marcus admitted his involvement in, and ultimately pleaded guilty or no contest to, four or five robberies and one attempted robbery. One of these crimes was the 7-Eleven robbery in this case. During his police interview, Marcus identified defendant as also having been involved in the heist. And, he admitted having previously stolen from a residence in Modesto the shotgun that was used by defendant during the commission of the crime. Marcus also admitted to being the

getaway driver parked near the store. He ultimately entered into a plea bargain under which he would serve eight years in prison on the condition that he testify truthfully at any trial of an accomplice to the robberies.

The same detective who interviewed Marcus also interviewed Albert Garcia, whom the detective believed was another of defendant's relatives. Albert was in custody in connection with another robbery and he ultimately admitted to being the getaway driver in five related robberies. He denied being involved in the 7-Eleven robbery in this case but indicated that he knew who had been. Albert told the detective that, on the morning of the robbery, Michael, Marcus, and defendant stopped by his house, and Albert overheard them talk about getting some money from the 7-Eleven robbery. Albert told of the robbers' self-described use of a shotgun with pistol grips during the crime.

The detective who interviewed Marcus and Albert then briefed Mike Nascimento of the San Jose Police Department. Detective Nascimento relayed some of the substance of the briefing to his partner, Detective Erik Hove, and instructed him to arrest defendant if the opportunity arose. Detective Hove arrested defendant outside his house around 1:45 a.m. on December 21, 2002, and brought him to the preprocessing center at the San Jose Police Department. When defendant was arrested, he was put in handcuffs, but he physically resisted being placed inside the police car and he screamed to his friends and family to help him. When questioned by an officer during booking, defendant did not appear intoxicated or confused, nor did he appear to lack understanding of what the officer was asking of him. After being booked, defendant was taken to an interview room to await the arrival of Detective Nascimento.

3. Defendant's Interview

Defendant was alone in the interview room with Detective Nascimento, who arrived at about 3:40 a.m. At that time, the detective took a urine sample from defendant, which later came back negative for both alcohol and commonly used drugs. The room was wired with a recording device and the interview was audiotaped.

Before the taped portion of the interview began, defendant asked what he had been arrested for, and Nascimento informed him that he had been arrested for armed robbery. Addressing the prison time he was facing, defendant asked about the penalty for armed robbery. In response, Nascimento handed defendant a Penal Code book so he could read for himself what the penalty was. The detective then indicated that he thought the penalty was "something like two, three or six" years.

The taped interview began with defendant being advised of his *Miranda* rights, and his waiver of those rights. Though defendant seemed nervous to Nascimento at the beginning of the interview, throughout it he appeared to understand what was being said to him. Nascimento then showed defendant two "apology" letters written by Marcus Rubalcaba and Albert Garcia, respectively. The detective indicated that he would present the letters to the judge.

Nascimento stated that he knew defendant had committed the 7-Eleven robbery and had used a shotgun in the course of the crime. Defendant did not deny his involvement in the robbery either in response to that specific accusation or at any time during the interview. The detective indicated to defendant that the surveillance video showed Michael going in the store first, followed by defendant, whose face was only partially concealed. Nascimento did not say that defendant actually could not be identified from the video, instead implying the opposite.

These statements were followed by Nascimento asking defendant whether he had forced Michael, who was a minor, to participate in the robbery. The detective indicated that such force, if used, would have amounted to contributing to the delinquency of a minor, an additional crime. Defendant said nothing in response. After that short pause, Nascimento briefly left the room to get defendant more water to drink. On Nascimento's return, defendant still did not answer the pending question about whether he had forced Michael to participate in the robbery, instead focusing again on what kind of penalty he was facing. He stated, "I'm just lookin' what I'm in for." Nascimento responded:

"Well, I'll be honest with you, it's ugly." This exchange was followed by the detective referring again to the apology letters written by Marcus and Albert, and his representation that he would indicate—apparently to the judge—that Marcus and Albert had been cooperative, which, he said, would "weigh."

In response to this, defendant expressed his skepticism that the letters would have any real effect and his belief that Marcus and Albert would receive the same sentences despite their letters or cooperation. Nascimento followed up with a Pavlovian analogy to disciplining a dog, i.e., bad behavior is punished whereas cooperation is rewarded. He stated, "You can . . . reward [the dog] when it's good and you can punish it when it's bad. Why would somebody punish you more when you're being cooperative, or telling the truth? That doesn't make any sense. It doesn't make no sense at all. You see what I'm sayin'?" In response, defendant again expressed his general disbelief that cooperation would affect sentencing outcome.

Nascimento then highlighted that defendant had no prior felonies, and that he would put in his report that defendant was being cooperative and was remorseful. He contrasted how the judge would view this positive information as opposed to a prior record of felonies that would cause a judge to " 'give him the book.' " Nascimento stated, "He's gonna look at your record. There's no felonies. You're not being disrespectful. Why would he hammer someone who's cooperating and hasn't—don't have a, a dirty background? Well, I'm just giving you this opportunity. If you want to, then it's fine. If you wanna do the same, as give, do an apology letter, I'll let you do that too." To this, defendant responded, "What do you wanna know?"

Nascimento then returned to the inquiry about whether defendant had forced Michael into doing the robbery, to which defendant responded that he had not forced anyone. The detective next inquired whether the gun that Michael had used in the robbery was real or fake. Defendant replied that he did not know, and that he only knew what he "had." This was followed by defendant's questions to the detective concerning

who had already said what about the robbery. Nascimento acknowledged that when he first viewed the videotape of the robbery, he thought it was Albert who was carrying the shotgun. Defendant queried this, as if testing just how much police already knew about his involvement in the robbery, and gauging whether he should avoid further implicating himself. Nascimento then implied that Albert had cleared up any earlier confusion about the identity of the second robber, and vindicated himself, by naming defendant as the one with the shotgun.

Further probing the extent of already-acquired police information, defendant then resumed questioning the detective about who had said what about the robbery. Nascimento refused to reveal this information but stated that he knew defendant had been involved, that "everybody" had said so, and that a fingerprint would confirm it. Defendant expressed his disbelief that his own family members would have informed on him. ["My own family? [¶] . . . [¶] My own family?"] This was followed by his resigned acceptance of the fact that his relatives had, indeed, ratted him out. ["My own family."]

Then, Nascimento asked defendant if he had participated in only the 7-Eleven robbery or whether he had also been part of an ATM robbery "with the other guys," which, he said, had likewise been videotaped. Defendant responded by admitting that the 7-Eleven robbery was the only one he "did."

Defendant then returned, once again, to the topic of how much time he would be facing. The detective referred defendant back to the Penal Code that he had looked at earlier. Emphasizing his concern about the penalty he was facing, defendant then stated that he could not "do no fuckin' four and a half years . . . [¶] . . . [¶] [e]specially in the pen. I ain't ever been in the fuckin' pen."

Nascimento then deflected the subject of penalty by asking defendant whether the purpose of the robbery had been to get money to satisfy a drug debt. Defendant denied this, asserting that he did not owe anybody anything and that, instead, people owed him.

Returning to the subject of incarceration, defendant said he would have to use the money he was owed "for commissary."

The detective then changed the subject by directly asking defendant for the first time if he wanted to "write an apology letter too or no?" Nascimento followed this up with the statement that it was "up to" defendant to do so or not. Defendant inquired whether he had to write the letter right then, or whether he could do it later. Nascimento responded that he would give defendant an opportunity to do it only then, but if defendant wanted to write the letter later, he could do it through his "public defender." Defendant next asked if he wrote the letter right then, would it be "add[ed]" to those written by Marcus and Albert. Nascimento replied that he would put defendant's letter with the others, and he would provide it to the District Attorney to show that defendant was remorseful.

Defendant then, once again, revisited the subject of incarceration by asking Nascimento about the conditions for visitation privileges. The detective answered these questions and then returned to the details of the robbery by asking defendant how much money had been taken, where the perpetrators went after committing the crime, and whether defendant sometimes "partied" with the others at a particular residence. The defendant briefly and directly answered these questions, and volunteered that he "smoke[d] weed" but only did "the other stuff once in a while." Nascimento then asked defendant how often he did crank. Defendant replied, "Probably not even once a month." Nascimento said, "Once a month? Okay." Defendant immediately corrected this—"No, I said probably not even once a month."

Nascimento then asked defendant where he had gotten the shotgun used in the robbery. Defendant replied, "I just got it." Nascimento responded, "Did Marcus give it to you, or Albert?" Defendant said, "I ain't gonna say no names." Nascimento responded, "Okay, . . . I'll respect that. But I know you're not the one that went to Modesto and did that burglary, right?" Defendant replied, "I didn't do no, the only one I

did was at 7-11." Nascimento followed up, "Okay. What I'm sayin' is, where the shotguns came from? That's a burglary. Going in at, when no one's in there. Were you there too or no?" Defendant answered, "No."

Nascimento then asked defendant why he had committed the crime. Defendant responded that he had been "under the influence" of alcohol. The detective followed up by asking what defendant did with the shotgun after the robbery, to which defendant replied that he did not know or could not remember. Then, Nascimanto asked defendant a second time whether he wanted to write a letter of apology, reiterating that the decision was up to him. Defendant responded, "I can't even think right now." Nascimento replied, "Okay, that's fine. I can understand that." Defendant then said, "I'm tired."

After some other brief colloquy, Nascimento asked defendant whether there was "anything else you wanna say? Are you sorry you did it?" Defendant said, "Yeah." Nascimento then said, "I'm gonna say that you said you were sorry. Are you willing to give some of that money back to the victim?" Defendant expressed confusion about how this would be accomplished. Nascimento said, "Well, I can, I think it would show, on your part, that you're remorseful if you can have somebody, you know, the victim, the dude that you pointed the gun at? If he gets the money back, it shows the judge, hey, look, the guy, at least he gave up some money. You said you had about sixty to seventy bucks out of that. I, it's up to you. I'm not telling you you have . . . ." Defendant then interrupted with some questions about how he could go about returning the victim's money. Nascimento directed defendant to talk to his attorney and said, "I'm just giving you ideas. So . . . it looks like you're not a big jerk. That's what I'm trying to do."

After further questions from defendant about how the money could be returned, Nascimento suggested that defendant's lawyer might advise him not to give back any money anyway. But, he offered, if it were him or his child in defendant's position, he would say, " 'This is what you're gonna do.[] You're gonna write a letter. You're gonna phone the victim. You're gonna pay back all that money. And, you're, and you're gonna

write a letter to the judge, on the sentencing day, and you're gonna ask him for, you're gonna beg for mercy.' That's what I would do. I can't tell you what you can do. You see what I'm sayin'? Like I said, I don't get off on seeing young guys go to prison."

Defendant responded that he did not want to go to prison, but he guessed that that was where he was going. Nascimento said, "Well you know what? It's up to you if you wanna go for a little while or a long time. And I don't think you wanna go for a long time." Defendant replied, "Shit, I don't wanna be in there fuckin' for a little bit. I don't wanna go there for a long time."

After a brief, unrelated exchange, Nascimento said, "Okay, so you're gonna . . . talk to your attorney about doing this or what? Okay. All right. . . . I'm not gonna charge you with contributing to the delinquency of a minor, because Michael is only seventeen. But later on down the road the D.A. may do that. Just so you know that, okay? But I'm not gonna do that. I'm not gonna write on the booking sheet, contributing to the delinquency of a minor." Defendant queried whether such a charge might get him even more time, to which Nascimento responded that it could mean six months more.

Nascimento then asked defendant if there was anything else he wanted to add, and if there was anything at defendant's house that was taken either from the 7-Eleven or any of the other robberies committed by Marcus, Michael, or Albert. Defendant indicated "No" to each question. Nascimento next asked defendant where the black, hooded top was that he had worn in the robbery. Defendant said that it should be in his bedroom. After some further questions about the details of the garment, the taped interview concluded. At that point, it was around 4:00 a.m. in the morning—some 20 minutes after the interview had begun.

Defendant never wrote the letter of apology. Nor is there any evidence in the record that he returned money to the victim, or did anything else that Nascimento had suggested he himself would do to invoke the mercy of the court at sentencing.

At the time of the interview, defendant was 20 years old and had an 11th-grade education. He had no prior felony convictions. He had been arrested once before as an adult and had three prior misdemeanor convictions, as well as a juvenile record.

Procedural Background

The defendant was charged by information with one count of second degree robbery in violation of Penal Code section 211-212.5, subdivision (c). The information also alleged that in the commission of the robbery, defendant personally used a firearm as set out in Penal Code section 12022.53, subdivision (b).

At trial, defendant renewed a motion to suppress his postarrest statement on the basis that it was involuntary. The People filed a response to the motion and the trial court conducted an Evidence Code section 402 hearing on the issue at which several witnesses, including Detective Nascimento, testified. The court also heard the audiotape of defendant's postarrest interview and admitted the transcript of the tape into evidence.

Upon conclusion of the hearing, the court denied the motion and found that defendant had been properly advised of his *Miranda* rights, and that he had "clearly articulated a waiver of those rights and he knowingly intelligently and voluntarily gave his confession." The tape was later played to the jury and the transcript admitted into evidence.

In addition to the tape of the interview itself, the jury also heard Detective Nascimento testify at trial as to what had occurred during defendant's postarrest interview and what Michael had previously said concerning defendant's involvement in the robbery. Another police officer testified about Marcus and Albert having implicated defendant in the robbery and about their own confessions in jail interviews. And, the jury heard the testimony of Marcus and Albert, both of whom then denied being able to recall

much about the crime.[2] Marcus did testify that he was the getaway driver in the robbery. Excerpts from the tapes of Marcus's postarrest interview, and portions of the transcript of it, which implicated defendant in the crime, were also presented for the jury's consideration.[3]

Hothi, the store clerk, also testified. He identified in court a shotgun with a "handle grip" as being like the shotgun pointed at him by the second gunman in the robbery. He was asked to describe the height and stature of the perpetrators, and he did so consistent with these physical characteristics of Michael and defendant, respectively. The jury also viewed the store's surveillance video of the robbery. And, they heard that defendant was left-handed, just like the hooded perpetrator on the video carrying the gripped shotgun.

The defense called one witness, a woman who was "seeing" defendant in November 2002 at the time of the robbery. She testified that she and defendant were together after she got off work in the early morning hours of nearly every day in that time period. But, she had no specific recollection of being with defendant on November 5, 2002, at the time of the robbery and only assumed that they had been together then because that was the case at that time of day on most days in that time period.

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[2] Specifically, Marcus testified that he did not remember telling the police officer after his arrest: 1) that he had participated in the November 5, 2002 robbery; 2) that defendant and Michael were the other participants in the crime; 3) that he had stolen a "pistol grip" shotgun during a burglary in Modesto; 4) that defendant had used that shotgun in the 7-Eleven robbery; and 5) that he had heard defendant and Michael discuss having "jacked" the clerk on their way out of the store.

Albert testified that he did not remember telling police: 1) that Marcus had been the getaway driver in the robbery; 2) that he himself did not participate in the 7-Eleven robbery but that he knew who had; 3) that defendant, Michael, and Marcus had committed the robbery using the pistol grip shotgun; and 4) that after committing the robbery, they came to his house.

[3] As to the tape, Marcus testified that he did not even recognize his own voice or remember saying the words on the tape.

After a three-day trial, the jury convicted defendant as charged and found true the firearm enhancement. The trial court later sentenced defendant to the middle term of three years for the robbery conviction and 10 years consecutive for the firearm enhancement, for a total fixed term of 13 years. The court also imposed a restitution fine of $2,600. This appeal followed.

Discussion

1. Issues on Appeal and Standard of Review

Defendant contends that the trial court erred by admitting his incriminating statements made to Detective Nascimento in the course of the tape-recorded, postarrest interview because they were involuntary.[4]

Where, as here, the defendant's statement was tape-recorded, the details of the interview are undisputed, and we review them independently. (*People v. McClary, supra,* 20 Cal.3d at p. 227; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) Likewise, the trial court's determination as to the ultimate issue of voluntariness—primarily a legal issue—calls for independent review. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) This standard of review extends to the lower court's determinations concerning whether

[4] The parties dispute whether the statements constituted a confession or only admissions. A confession is "a declaration of defendant's intentional participation in a criminal act, whereas an admission is merely the recital of facts tending to establish guilt when considered with the remaining evidence in the case." (*People v. McClary* (1977) 20 Cal.3d 218, 230, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510.) "A confession must encompass all the elements of the crime." (*People v. Thompson* (1990) 50 Cal.3d 134, 162, fn. 10.) But, the distinction between an admission and a confession is one without a difference for purposes of our analysis. The same harmless error standard—harmless beyond a reasonable doubt—now governs review of the erroneous admission of either a confession or an admission. (See *People v. Cahill, supra,* 5 Cal.4th at pp. 509-510, overruling prior case law that had held the erroneous admission of a confession, as opposed to an admission, to be reversible per se; see also *Arizona v. Fulminante* (1991) 499 U.S. 279.) Thus, we need not decide whether defendant confessed or merely made admissions.

coercive police activity was present, whether certain police conduct constituted a promise of leniency, and if so, whether the promise operated as an inducement. (*Ibid.*)

2. Governing Principles

A defendant's admission or confession is involuntary, and thus inadmissible at trial, if it is the product of coercive police activity. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; *People v. Williams* (1997) 16 Cal.4th 635, 659.) Federal and state constitutional due process requirements prohibit the use at trial of involuntary statements obtained by official coercion, which is most often associated with the use of force, overbearing threats, or promises of leniency.[5] (*Colorado v. Connolly, supra*, 479 U.S. at pp. 163-167; *People v. Benson* (1990) 52 Cal.3d 754, 778.) Under both state and federal law, before a defendant's statement may be admitted into evidence, the prosecution has the burden of proving by a preponderance of the evidence that the statement was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Sapp* (2003) 31 Cal.4th 240, 267; *People v. Massie, supra,* 19 Cal.4th at p. 576.)

In deciding the question of voluntariness, the United States Supreme Court has directed that courts consider the "totality of circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Williams, supra,* 16 Cal.4th at p. 660.) Among the factors to be considered in the analysis are: 1) the crucial element of police coercion; 2) the length of the interrogation; 3) its location; 4) its continuity; and 5) the defendant's maturity, education, physical condition, and mental health. (*People v. Williams, supra*, 16 Cal.4th at p. 660.) As we have previously observed, the characteristics of the accused that may be examined include his or her age, sophistication, prior experience with the criminal justice system, and emotional state. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209 (*Shawn D.*).)

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[5] The implicated constitutional provisions are the Fourteenth Amendment to the United States Constitution and Article I, section 15 of the California Constitution. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

In determining whether a confession was voluntary, the issue is whether defendant's choice to confess was not "essentially free" because his will was overborne. (*People v. Massie, supra*, 19 Cal.4th at p. 576.) No one factor is dispositive of the issue; rather, the totality of the circumstances, which include both the characteristics of the accused and the details of the interrogation, must be considered in view of the entire record. *(People v. Neal* (2003) 31 Cal.4th 63, 79*; People v. Williams, supra,* 16 Cal.4th at p. 661; *People v. Vasila, supra*, 38 Cal.App.4th at pp. 873-874.) Likewise, no single word, phrase, or event determines whether a statement was voluntary. Instead, the conclusion is derived from the totality of the facts and circumstances of each case, keeping in mind the particular background, experience, and conduct of the particular defendant. (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.) "[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." (*Miller v. Fenton* (1985) 474 U.S. 104, 116.)

As noted, coercive police activity is a necessary prerequisite to a finding that a confession was involuntary. (*Colorado v. Connolly, supra*, 479 U.S. at p. 167; *People v. Benson, supra,* 52 Cal.3d at p. 778.) But, police are prohibited from using only those psychological ploys that, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*People v. Jones, supra,* 17 Cal.4th at pp. 297-298.) Impermissible coercion includes, depending on the circumstances, the eliciting of a confession by a promise of benefit or leniency, whether express or implied. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on another ground in *People v. Cahill, supra,* 5 Cal.4th at p. 510.)

But, even an actual promise of leniency does not alone make a confession involuntary. "[A]n improper promise of leniency does not render a statement involuntary

unless, given all the circumstances, the promise was a motivating factor in the giving of the statement." (*People v. Vasila, supra*, 38 Cal.App.4th at p. 874.) "A confession is 'obtained' by a promise within the proscription of both the federal and state due process guarantees if and only if inducement and statement are linked, as it were, by 'proximate' causation. . . . The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient. [Citation.] 'If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action.' [Citation.]" (*People v. Benson, supra*, 52 Cal.3d at pp. 778-779.)

In assessing whether improper inducements were made that rendered the accused's statements involuntary, threats or promises of leniency or other advantage are considered. But, neither truthful statements that the accused's cooperation might be useful in later plea negotiations nor advice or exhortation that it would be better to tell the truth, when unaccompanied by threats or promise, will render a statement involuntary.[6] (*People v. Jones, supra*, 17 Cal.4th at p. 298; *People v. Williams, supra*, 16 Cal.4th at pp. 660-661.) When the police merely point out a benefit that flows naturally from truthful and honest conduct, a subsequent statement will not be considered involuntary. (*People v. Thompson, supra,* 50 Cal.3d 134, 170.) Thus, a police officer does not invalidate a subsequent confession by merely commenting on the realities of the situation. (*In re Gomez* (1966) 64 Cal.2d 591, 593; *People v. Seaton* (1983) 146 Cal.App.3d 67, 74.)

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[6] We note that language from *Bram v. United States* (1897) 168 U.S. 532, 542-543, upon which defendant relies ["A statement is involuntary when, among other circumstances, it 'was extracted by any sort of threats [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence' "], is not the current state of federal or state law concerning the standard for determining the voluntariness of a confession. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 285; *People v. Cahill, supra*, 5 Cal.4th at pp. 513-514, fn. 2.)

Similarly, police comments to the effect that the accused would "feel better" or would be "helping himself by cooperating" do not alone establish improper inducement. (*People v. Jackson* (1980) 28 Cal.3d 264, 299-300, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Likewise, "[T]ruthful and 'commonplace' statements of possible legal consequences, if unaccompanied by threat or promise, are permissible police practices and will not alone render a subsequent statement involuntary and inadmissible." (*People v. Flores* (1983) 144 Cal.App.3d 459, 469.)

On the other hand, "[I]f . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible." (*People v. Hill* (1967) 66 Cal.2d 536, 549.) In making the distinction between permissible police activity and improper inducements, "[C]ourts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 340.)

As with a promise of leniency, the use of deception or the communication of false information to an accused does not alone make a subsequent statement involuntary. (*People v. Thompson, supra,* 50 Cal.3d at p. 167.) Confessions prompted by deceptive police statements or tactics are admissible so long as the deception is not of a type that is reasonably likely to produce a false confession. (*People v. Jones, supra*, 17 Cal.4th at p. 299.) In particular, deception concerning the evidence, or degree of knowledge possessed by police is permissible. (*Ibid*.) Deception is, however, like promises of leniency, a factor that weighs against a finding of voluntariness. (*People v. Thompson, supra,* 50 Cal.3d at p. 167.)

3. *Analysis of Voluntariness*

Asserting a violation of due process, defendant challenges the admission into evidence at trial of his postarrest, incriminating statements to Detective Nascimento. He claims that his statements were involuntary because Nascimento used deception and made an express promise of leniency that was their primary, motivating cause. Defendant identifies the impermissible police conduct as Nascimento promising to him additional benefits—over and above that which naturally flows from truthful and honest conduct—for "admitting his complicity in the robbery by writing a letter of apology" and "cooperating."

With the above governing principles in mind, we begin our analysis by observing that defendant was an adult at the time of the robbery, as well as at the time of his arrest and subsequent police interview. The interview was conducted by just one officer, it was not excessive in length, the officer's demeanor and tone were civil and professional, and there were no express or implied threats made against defendant. There is no evidence in the record of police overreaching, badgering, or a course of conduct designed to break the will of the accused. At the time of the interview, defendant was not unfamiliar with the custodial or judicial processes as he had three prior misdemeanor convictions and a juvenile history. Defendant was not under the influence of alcohol or drugs during the interview. And, while he expressed that he was tired toward the end, there is no evidence in the record that he was fatigued to the point of emotional or psychological impairment.

While defendant physically resisted arrest prior to the interview, his demeanor while he was being questioned by Detective Nascimento was calm and rational. Though he did not complete high school, by his responses and engagement in the conversation, defendant appeared to understand what was being said to him. And, there is no claim that he did not understand his *Miranda* rights, or the consequences of his intelligent and knowing waiver of them.

Defendant appeared nervous at the outset of the interview; and, throughout it, he was clearly concerned with and focusing on the penalty he was facing. But, these are natural reactions to the situation defendant was in and they did not render him more vulnerable than most arrestees to the officer's questions or statements or to the events of the interrogation.

Further, as to defendant's claim that he was confused and fatigued, his responsive engagement throughout the conversation with Nascimento belies this assertion. And, it was only after defendant had made incriminating statements about the robbery that he said that he " '[couldn't] even think right now' " in response to the direct question, asked a second and last time, about whether he wanted, then and there, to write a letter of apology. Nascimento replied that he understood, and never raised the question again.

Defendant's ready ability to refute accusatory suggestions made by the officer further demonstrated that defendant's will was not overborne by coercion such that his statements were involuntary. Though defendant never denied his involvement in the robbery, he repeatedly denied having participated in other crimes. If his will had been overcome by promises of leniency, one would expect defendant to confess to the other crimes, not just to the provable robbery of the 7-Eleven. Defendant also consciously refused to give any information about any other suspects. And, he immediately corrected Nascimento about the frequency with which he used drugs. He did not agree to write the letter of apology during the interview, but he preserved the option of doing it later by asking how that could be accomplished. Upon Nascimento's suggestion that he repay money to the victim, he also asked several questions about the logistics of doing that.

All of these facts relating to the characteristics of the accused and the details of the interrogation, especially defendant's denial of his involvement in other crimes, demonstrate that defendant was not coerced and that his will was free and not overborne. These facts also provide the context for our review of the specific statements made by Detective Nascimento that defendant challenges.

After reviewing the transcript of the interview and listening to the tape itself, we conclude that none of Nascimento's statements made during the course of defendant's interview rendered his admissions or confession involuntary. To begin with, none of the statements that sought to elicit defendant's general cooperation or his apology letter amounted to a promise of leniency. Though Nascimento indicated that the letters written by Marcus and Albert, and their cooperation, would "weigh," and that it only made sense that a non-cooperating defendant with a record of prior felonies would receive greater punishment, this is distinct from an express promise, assurance, or guarantee that either a similar apology letter from defendant or his cooperation was in exchange for and would result in a lesser punishment or some other advantage.

It is true that throughout the interview, Nascimento repeatedly emphasized through his exhortations and his canine discipline analogy that a letter of apology and defendant's cooperation and honesty would matter to the judge in sentencing and would be beneficial to defendant in terms of the ultimate penalty that would be imposed for the robbery. But, Nascimento did not express or imply that he had control over sentencing or was in a position to offer a quid pro quo and defendant did not appear to understand Nascimento's statements this way. Particularly in the context of this police interview devoid of threats or aggressive interrogation, and where it was defendant himself who was repeatedly raising the subject of the prison term he was facing, Nascimento's statements were more akin to strong advice or exhortation that it would be to defendant's benefit to write the apology letter and cooperate than they were coercive and impermissible inducements.

Although the indications that defendant would benefit in sentencing if he cooperated and wrote a letter of apology, taken in isolation and without more, might be viewed as a promise of leniency, whether express or implied, we do not consider the words spoken in a vacuum but in the context of the entire conversation. Of that whole exchange, Nascimento's canine discipline analogy comes closest to the constitutional line

in its allusion to cooperation being rewarded. ["[Y]ou can reward [the dog] when it's good and you can punish it when it's bad. Why would somebody punish you more when you're being cooperative, or telling the truth?"] While we do not express approval of this tactic, in this context the detective's statements amounted to no more than permissible "truthful implications that [defendant's] cooperation might be useful in later plea bargain negotiations," (*People v. Jones, supra*, 17 Cal.4th at p. 298) or true indications that cooperation by early admissions of guilt at that stage of the criminal process would be beneficial as a mitigating factor in sentencing. (Pen. Code, § 1170, subd. (b); rule 4.423(b)(3) of the California Rules of Court.)

Detective Nascimento neither promised defendant leniency as consideration for admitting the crime nor threatened to charge him or treat him more severely if he did not do so. Though defendant characterizes the detective's words and conduct as amounting to an express promise of leniency, on this record they are at most the aggressive suggestion of a benefit that "flows naturally from a truthful and honest course of conduct." (*People v. Hill, supra*, 66 Cal.2d at p. 549; *People v. Howard, supra*, 44 Cal.3d at p. 398.) Detective Nascimento's statements were not promises of leniency, but rather true statements of the consequences that would occur if defendant told the truth. As such, and based on the totality of the circumstances surrounding the interrogation, nothing that Nascimento did or said to defendant during the interview either crossed the constitutional line into impermissible coercion or leads us to conclude that defendant's will was overborne.

Even if we were to conclude that Detective Nascimento's questioning of defendant veered into impermissible promises of leniency, on this record, we would still conclude that defendant's incriminating statements were voluntary because any such promises were not their primary, motivating cause. Starting specifically with the letter of apology that was referenced several times throughout the interview, defendant never succumbed

to this inducement and it therefore cannot be said that it was the proximate cause of, or even a factor leading to, his admissions or confession.

The same is true of Nascimento's general exhortations for cooperation, including the canine discipline analogy. Even after that reference was made, defendant echoed his previous skepticism that cooperation would result in a lesser sentence. If defendant himself did not believe that his cooperation would result in reward or advantage, something he expressed twice, then the inducement implied by the canine discipline analogy was not the primary motivating cause of the admissions or confession that followed.

What's more, after listening to the tape and reading the transcript of the interview, we conclude that the turning point in the interrogation does not appear to have been Nascimento's exhortations for cooperation or a letter of apology. Rather, the interview actually diverged, and produced what comes closest to a confession, only upon defendant's reluctant acceptance and recognition of the fact that the detective knew he had committed the robbery, and that his compatriots had talked and had implicated him.

Turning to all the other steps that Nascimento suggested might help with regard to sentencing, such as returning money to or phoning the victim, or writing a letter to the judge, the record contains no evidence that defendant ever did any of these things. Moreover, by the point in the interview at which Nascimento made these suggestions, defendant had already offered all but one of his incriminating statements.[7] Therefore, these expressions cannot be said to have causally induced defendant to make admissions or confess. The same is true of Nascimento's statement that it was up to defendant whether he wanted to go to prison for "a little while or a long time," as even if this statement constituted an improper inducement, it was made after all but one of

[7] The only one that followed was defendant's statement to Nascimento in response to a question that the black, hooded top he wore during the robbery could be found in his room.

defendant's incriminating statements. Therefore, it could not have been the primary, motivating cause for the statements.

Finally, to the extent the detective in this case used deception in the course of the interview by implying that defendant's face was visible or identifiable from the videotape of the robbery, or by predicting that a fingerprint would confirm his involvement, this relatively minor deceit concerning the evidence is not of the type that is reasonably likely to produce a false confession or untrue statement. (*People v. Jones, supra*, 17 Cal.4th at p. 299*; People v. Thompson, supra,* 50 Cal.3d at p. 167.) Simply put, even though deception can weigh toward a finding of involuntariness, based on the totality of the circumstances of this entire record, Nascimento's overstatement of the evidence in the interview did not render defendant's statements involuntary.

Defendant relies primarily on our opinion in *Shawn D.* and urges that it likewise dictates a finding of involuntariness and a reversal here. Even though that case presents some similarities to this one in the content of the police interview, it also manifests critical differences that, on the totality of the circumstances, lead to a different result.[8] First, concerning the characteristics of the accused, in *Shawn D*. the accused was a minor who was "agitated" throughout the interrogation, which was at times double-teamed by two officers. Due to circumstances in his life, the accused's emotional or psychological state was vulnerable. (*Shawn D., supra,* 20 Cal.App.4th 200, 205, 206, 212-213.) In contrast, there is nothing in the record here to suggest that defendant, an adult, was compromised or vulnerable, other than being tired at the time of the middle-of-the-night interview.

[8] The major factual similarities are the repeated representations that the accused's cooperation would be noted in the police report, and the urging of the accused to return to the victim the spoils of the crime. There is also the presence of some degree of deception or overstatement of the evidence, but this was far more extreme in *Shawn D*.

Second, unlike the defendant in this case who never denied being involved in the robbery, the accused in *Shawn D.* repeatedly denied his involvement in the crime before being gradually induced to incriminate himself. (*Shawn D., supra,* 20 Cal.App.4th at pp. 204, 206.) Third, unlike here where no threats were made, the police threatened the accused in *Shawn D.* by telling him that if he continued to lie, that would be indicated on the police report. (*Id.* at p. 204.) There was also the threat in that case that unless the accused confessed, he would be tried as an adult instead of a juvenile, and would be subject to state prison or San Quentin as opposed to the CYA. This is in addition to the express promise in *Shawn D.* that if the accused cooperated in returning property to the victim, then the officer would "personally talk to the D.A." about keeping the matter in the juvenile realm. (*Id.* at p. 207.) And, the officer in *Shawn D.* suggested that in exchange for the accused's confession, he would be able to see his pregnant girlfriend again, and she would be spared from prosecution.

In this case, by contrast, there were no similar quid pro quos or consideration offered in exchange for defendant's cooperation or confession. Instead, the detective merely pointed out that defendant's cooperation, along with his lack of prior felonies, would be factors going in his favor when it came to sentencing—benefits that naturally flow from an honest course of conduct and telling the truth.

Third, in *Shawn D.*, the officer falsely represented to the accused (who had driven another person to a house to commit the burglary but who did not himself enter the residence) that a mere driver was less culpable for a robbery and that "explaining" and admitting his limited role as the driver would thus result in his own lesser culpability. (*Shawn D., supra,* 20 Cal.App.4th at pp. 205, 215.) In this case, by contrast, the police deception was no more than overstatement of the evidence against the defendant, which is generally permissible. (*People v. Jones, supra*, 17 Cal.4th at p. 299.)

Finally, in *Shawn D.*, unlike here, the intensity of the interrogation's pressure increased as it went on, and gradually culminated in the accused's change of story and his

confession. And, we concluded in that case that in addition to the numerous problematic details of the interrogation that were alone insufficient to render the confession involuntary, "[t]he promise of leniency in exchange for a confession permeated the entire interrogation." (*Shawn D., supra,* 20 Cal.App.4th at p. 216.) While throughout the interview in this case, the defendant was repeatedly urged to cooperate and was reminded of the benefits that flow from being truthful, this is wholly distinct from impermissible inducements dominating the entire interrogation.

In sum, the totality of the circumstances presented in *Shawn D.* created a much different picture from those presented here. In addition to the vulnerability of the minor accused in that case, the tone, tenor, level of deception, repeated use of threats and express promises, and intensity of pressure employed by police all resulted in impermissible coercion and the will of the accused being overborne. Consequently, we reached the conclusion in that case that the accused's confession was involuntary. But based on the totality of circumstances presented here, which are in stark contrast to those presented in *Shawn D*., we simply cannot reach the same conclusion.

Accordingly, from our own independent review, we conclude that after the defendant waived his *Miranda* rights, he knowingly, intelligently, and voluntarily gave the incriminating statements. The detective's various statements and representations about which defendant complains were not, under all the circumstances, so coercive that they tended to produce a statement that is both involuntary and unreliable—the constitutional line that police may not cross. (*People v. Jones, supra*, 17 Cal.4th at pp. 297-298.) Since the detective's representations either did not amount to impermissible inducements, or they were not the primary, motivating cause of defendant's incriminating statements, those statements were not involuntary, and the trial court properly admitted the tape and transcript of defendant's postarrest interview.

Disposition

The judgment is affirmed.

Walsh, J.[*]

WE CONCUR:

Rushing, P.J.

Premo, J.

[*]Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.